SUPREME COURT OF THE UNITED STATES
2015-2016 TERM

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DEFICIENT COUNSEL

Maryland v. Kulbicki, 577 U.S. --- (2015), Decided October 5, 2015

FACTS: On 1993, Kulbicki shot his 22 year old girlfriend in the head, killing her, over a dispute related to a paternity suit. In 1995, at his criminal trial, Agent Poole (FBI), testified about the Comparative Bullet Lead Analysis (CBLA), as the CBLA experts had been doing for decades. Specifically, he testified that the "composition of elements in the molten lead of a bullet fragment found in Kulbicki's truck matched the composition of lead in a bullet fragment removed from the victim's brain," to the degree of certainty expected in the analysis. (It was not exact, but "similar enough" to find it likely that it came from the same package.) Ultimately, Kulbicki was convicted.

Kulbicki appealed and his case lingered in state court until 2006, when he added a claim that his defense attorneys were deficient in that they did not question "the legitimacy of the CBLA.) By that time, the "CBLA had fallen out of favor," and when Maryland "held for the first time that CBLA evidence was not generally accepted by the scientific community and was therefore inadmissible." Ultimately the Maryland high court vacated his conviction based on the CBLA issue, finding that his counsel was deficient for failing to challenge the use of the CBLA at trial.

Specifically, the court stated that his attorney "should have found a report coauthored by Agent Peele in 1991 that 'presaged the flaws in CBLA evidence.'" The information in the report suggested that sometimes the composition of bullets in separate boxes of ammunition, manufactured months apart, was the same. In fact, ultimately, that apparently led the courts to reject such evidence many years later. The Court noted that "any good attorney" should have spotted the flaw in the scientific method discussed in the report.

Maryland requested certiorari and the U.S. Supreme Court granted review.

ISSUE: Is it proper to expect defense counsel to be prescient and anticipate challenges to scientific evidence in the future?

HOLDING: No

DISCUSSION: The Court noted that in 1995, "the validity of the CBLA was widely accepted, and courts regularly admitted CBLA evidence until 2003." Under the contemporary assessment rule, the Court agreed it was not proper to speculate on whether a different trial strategy would have been more successful in the trial. The Court noted that even the 1991 report "did not question the validity of CBLA, concluding that it was a valid and useful forensic tool to match suspect to victim." In fact, the Court stated, there was no reason to believe that even the most diligent counsel would have even uncovered the report. In 1995, at the time of the trial, the World Wide Web was still in its earliest stages. The report, disseminated by the Government Printing Office to various public libraries in 1994, did not indicate to which libraries it was sent, "and in an era of card catalogues, not a worldwide web, what efforts would counsel have had to expend to find the compilation?"[1] And even had it been located, would counsel have been able to comb through it and find the potential flaw, which was apparently only a brief mention in a much larger report, which ultimately concluded that the process was valid?

The Court continued:

[1] Presumably it was sent to the public libraries that serve as Federal Depository Libraries throughout the U.S.

> Given the uncontroversial nature of CBLA at the time of Kulbicki's trial, the effect of the judgment below is to demand that lawyers go "looking for a needle in a haystack," even when they have "reason to doubt there is any needle there."[2]

The Court agreed that "reasonable competence," not "perfect advocacy," was what the right to counsel guarantees, and all that it guarantees.[3] The Court concluded that Kulbicki's attorney did not provide deficient counsel when they failed to uncover the report and use it against Peele during his testimony. The decision of Maryland's highest court was reversed.

42 U.S.C. §1983 – QUALIFIED IMMUNITY

Mullenix v. Luna, 577 U.S. --- (2015), Decided November 9, 2015

FACTS: On March 23, 2010, Sgt. Baker (Tulia, TX, PD) followed Leija to a drive-in restaurant, as he had a warrant for Leija's arrest. Baker approached the car and told Leija he was under arrest, but Leija sped off, heading for Interstate 27. Trooper Rodriguez (TX Department of Public Safety) joined in the chase. During an 18 minute chase, Leija made speeds of between 85-110 mph. Twice he called 911 and claimed to have a gun, and threatened "to shoot at police officers if they did not abandon their pursuit." This was passed on to officers, along with a report that Leija might be intoxicated.

Other officers set up tire spikes at three locations. Officer Ducheneaux (Canyon PD) was at the first location Leija was expected to reach. All of the officers had received training on spike strips, "including how to take a defensive position so as to minimize the risk posed by the passing driver." Trooper Mullenix (DPS) responded to that same location and discovered the strip had already been positioned, so he "began to consider another tactic: shooting at Leija's car in order to disable it." He had not been trained in doing so, but passed on his idea to Trooper Rodriguez and his Sergeant. However, before he heard back from his Sergeant, he took a shooting position on the overpass with his rifle. He was apparently instructed by the Sergeant (and could allegedly hear him from that position, although he disputed he heard that order) to stand by and see if the spike strips worked. He was told by Deputy Sheriff Shipman (Randall County, TX) that there was another officer under the underpass. As Leija approached the overpass, Mullenix fired six shots, of which four had been determined to have struck Leija, killing him. The vehicle rolled multiple times.

Leija's representative (Luna) filed suit under 42 U.S.C. §1983, claiming that Mullenix used excessive force against Leija. Trooper Mullenix moved for summary judgment, which was denied. Mullenix appealed and the Fifth Circuit Court of Appeals affirmed the denial. Mullenix requested certiorari and the U.S. Supreme Court granted review.

ISSUE: Is the question of whether a law enforcement officer is entitled to qualified immunity in a deadly force incident dependent upon the specific facts of the case?

HOLDING: Yes

DISCUSSION: The Court began by noting that:

> The doctrine of qualified immunity shields officials from civil liability so long as their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[4] A clearly established right is one that is "sufficiently clear that every reasonable official would have understood that what he is doing violates that right."[5] "We do not

[2] Rompilla v. Beard, 545 U. S. 374 (2005).
[3] Yarborough v. Gentry, 540 U. S. 1 (2003) (per curiam).
[4] Pearson v. Callahan, 555 U. S. 223 (2009) (quoting Harlow v. Fitzgerald, 457 U. S. 800 (1982)).
[5] Reichle v. Howards, 566 U. S. ___ (2012).

> require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate."[6]

Put simply, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law."[7] The Court continued by noting that the question must be "whether the violative nature of *particular* conduct is clearly established" and must be done under the "specific context of the case, not as a broad general proposition."[8] The Court stated that "such specificity is especially important in the Fourth Amendment context, where the Court has recognized that '[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts.'"

In this situation, the Fifth Circuit had ruled that the trooper violated "the clearly established rule that a police officer may not "'use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others'" – but the Court noted that was the precise issue at hand in Brosseau v. Haugen.[9]

The Court emphasized:

> In this case, Mullenix confronted a reportedly intoxicated fugitive, set on avoiding capture through high-speed vehicular flight, who twice during his flight had threatened to shoot police officers, and who was moments away from encountering an officer at Cemetery Road. The relevant inquiry is whether existing precedent placed the conclusion that Mullenix acted unreasonably in these circumstances "beyond debate."

The Court continued by agreeing that "excessive force cases involving car chases reveal the hazy legal backdrop against which Mullenix acted." Certainly, at the moment the shooting occurred, "Leija had led police on a 25-mile chase at extremely high speeds, was reportedly intoxicated, had twice threatened to shoot officers, and was racing towards an officer's location." The Court noted that it had "never found the use of deadly force in connection with a dangerous car chase to violate the Fourth Amendment, let alone to be a basis for denying qualified immunity." Although the traffic was lighter than it was in the cases of Scott v. Harris[10] or Plumhoff v. Rickard,[11] the fleeing drivers in those cases did not express direct threats to shoot officers, "nor were they about to come upon such officers." The Court noted that even though spike strips were in place, that did not guarantee he would not be able to pose a continuing danger to the officers in the immediate area. Whatever could be said about the wisdom of the choice the trooper made, it was not clear that he'd acted unreasonably under the circumstances. Although no weapon was ever seen, the court found the officers to be "justified in taking Leija at his word when he twice told the dispatcher he had a gun and was prepared to use it."

The Court concluded:

> At the time the trooper fired, "he reasonably understood Leija to be a fugitive fleeing arrest, at speeds over 100 miles per hour, who was armed and possibly intoxicated, who had threatened to kill any officer he saw if the police did not abandon their pursuit, and who was racing towards Officer Ducheneaux's position."

The Court granted Trooper Mullenix's petition and reversed the Fifth Circuit's decision that he was not entitled to qualified immunity.

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[6] Ashcroft v. al-Kidd, 563 U. S. 731 (2011).
[7] Malley v. Briggs, 475 U. S. 335 (1986).
[8] Brosseau v. Haugen, 543 U. S. 194 (2004) (per curiam) (quoting Saucier v. Katz, 533 U. S. 194 (2001)).
[9] Id.
[10] 550 U. S. 372 (2007).
[11] 572 U. S. ___ (2014).

SENTENCING

Lockhart v. U.S., --- U.S. --- (2016), Decided March 1, 2016

FACTS: In 2000, in New York, Lockhart was convicted of sexual abuse involving his adult girlfriend. Eleven years later, he was indicted in New York for attempting to receive and for possessing child pornography.[12] He pled guilty to the latter and the former was dismissed. During sentencing calculations, however, it was determined that he was subject to a mandatory minimum sentence due to the prior offense. The language of the statute, 18 U.S.C. §2252(b)(2), provides for a penalty enhancement if the prior offense relates to "to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward." Lockhart objected, arguing that the three categories should be considered to all require a minor victim, and his prior offense did not.

The District Court disagreed and sentenced him with the penalty enhancement. The Second Circuit Court of Appeals upheld his sentence. Lockhart petitioned for certiorari and the U.S. Supreme Court granted review.

ISSUE: Does the phrase "aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward" in 18 U.S.C. §2252(b)(2), require a minor to be the victim in all three of the listed offenses?

HOLDING: No

DISCUSSION: The Court framed the issue as "whether the limiting phrase that appears at the end of that list—"involving a minor or ward"—applies to all three predicate crimes preceding it in the list or only the final predicate crime." In considering the text, the Court noted, it had previously "interpreted statutes that include a list of terms or phrases followed by a limiting clause, we have typically applied an interpretive strategy called the "rule of the last antecedent."[13] The rule provides that "a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows." This rule had been applied consistently for many years, but is not absolute in the fact of contradicting evidence that something different was intended. In this case, however, that "here the interpretation urged by the rule of the last antecedent is not overcome by other indicia of meaning. To the contrary, §2252(b)(2)'s context fortifies the meaning that principle commands."

The Court agreed that the three terms are very similar, even possibly redundant, but that by "applying the limiting phrase, "involving a minor or ward" more sparingly, by contrast, [it] preserves some distinction between the categories of state predicates by limiting only the third category to conduct "involving a minor or ward." We recognize that this interpretation does not eliminate all superfluity between "aggravated sexual abuse" and "sexual abuse."[14] In fact, however, the language was drawn directly from another federal law, Chapter 109A, which is referenced in the full text of the underlying federal statute.

The Court continued:

> Faced with §2252(b)(2)'s inartful drafting, then, do we interpret the provision by viewing it as a clear, commonsense list best construed as if conversational English? Or do we look around to see if there might be some provenance to its peculiarity? With Chapter 109A so readily at hand, we are unpersuaded by our dissenting colleague's invocation of basic examples from day-to-day life. Whatever the validity of the dissent's broader point, this simply is not a case in which colloquial practice is of much use.Section 2252(b)(2)'s list is hardly the way an average person, or even an average lawyer, would set about to describe the relevant conduct if they had started from scratch.

[12] 18 U. S. C. §2252(a)(2); §2252(a)(4)(b).
[13] See Barnhart v. Thomas, 540 U. S. 20, 26 (2003).
[14] See U;S; v. Atlantic Research Corp., 551 U. S. 128 (2007).

The Court concluded, however, that "the text and structure of §2252(b)(2) confirm that the provision applies to prior state convictions for "sexual abuse" and "aggravated sexual abuse," whether or not the convictions involved a minor or ward. We therefore hold that Lockhart's prior conviction for sexual abuse of an adult is encompassed by §2252(b)(2)."

The Court affirmed the decision of the Second Circuit, and upheld Lockhart's sentence.

BRADY

Wearry v. Cain, --- U.S. --- (2016), Decided March 8, 2016

FACTS: On April 4, 1998, between the hours of 8:20 and 9:30, Walber was murdered in his Louisiana home. Two years later, Scott, who was in prison, implicated Wearry. However, he stated that Wearry and others had told him that they'd shot and driven over the victim, and that his body had been left on a specific road. However, Walber was not shot, and his body had been found on a different road. Scott changed his account at least five times, including admitting that he'd been part of the group involved, and each "differed from the others in material ways." By the time of Wearry's trial, Scott's "story bore little resemblance to his original account." Under cross-examination, Scott admitted that "he had changed his account several times." Another one of the group, Brown, also testified, and also "acknowledged that he had made a prior inconsistent statement to the police, but had recanted and agreed to testify against Wearry, not for any prosecutorial favor, but solely because his sister knew the victim's sister." The prosecution also "offered circumstantial evidence linking Wearry to the victim." This consisted of various witnesses who, in some cases, "contradicted Scott's account." Wearry's defense was an alibi that placed him 40 miles away, but that was refuted by other evidence.

Wearry was convicted. Following the trial, it was learned that the "prosecution had withheld relevant information that could have advanced Wearry's" defense. In two cases, the evidence indicated that Scott was not credible and had a motive to ensure Wearry's conviction. Further, it was learned, Brown did seek a deal and did get at least an informal promise that officers would "talk to the D.A." about his situation if he was truthful. Finally, the prosecution did not reveal the medical records on one of those allegedly involved, with suggested he would not be able to have done what Scott alleged he did. (Wearry also claimed his own attorney had not uncovered evidence that he should have, and which his second attorney, engaged during postconviction proceedings, easily discovered.) Wearry alleged violation of both Brady v. Maryland[15] and his Sixth Amendment right to effective counsel. The state courts denied relief and Wearry requested certiorari. The U.S. Supreme Court granted review.

ISSUE: Will the failure to reveal material exculpatory evidence during a trial likely lead to a reversal of the conviction?

HOLDING: Yes

DISCUSSION: The court first looked to Brady v. Maryland, which stated that ""[t]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." [16] Evidence is considered material when there is "any reasonable likelihood" that the evidence could have affected the jury's decision. The standard Wearry would need to meet was only that the "new evidence is sufficient to "undermine confidence" in the verdict."[17] The court agreed that the "State's trial evidence resembles a house of cards, built on the jury crediting Scott's account rather than Wearry's alibi."[18] The evidence, at best, indicated that someone in Wearry's group committed the murder, and certainly, he

[15] 373 U. S. 83 (1963).
[16] Id. See also Giglio v. U.S., 405 U. S.150 (1972) (clarifying that the rule stated in Brady applies to evidence undermining witness credibility).
[17] Smith v. Cain, 132 S.Ct. 627 (2012).
[18] See U.S. v. Agurs, 427 U. S. 97 (1976).

could have been charged as an accessory. However, he was charged with capital murder, at the "only evidence directly tying him to that crime was Scott's dubious testimony corroborated by the similarly suspect testimony of Brown." Had the jury had the additional information about Scott, and the records of the other individual's medical disability that indicated he was likely "physically incapable of performing the role Scott ascribed to him," and that Brown had, in fact, sought a deal, the jury might easily have found differently.

The Court vacated Wearry's conviction and remanded the case.

Caetano v. Massachusetts, 577 U.S. --- (2016), Decided March 21, 2016

FACTS: Caetano was involved in a "bad altercation" with her boyfriend that resulted in her being hospitalized. She "obtained multiple restraining orders against her abuser, but they proved futile." A friend provided her with a stun gun for self-defense.

> It is a good thing she did. One night after leaving work, Caetano found her ex-boyfriend "waiting for [her] outside." He "started screaming" that she was "not gonna [expletive deleted] work at this place" any more because she "should be home with the kids" they had together. Caetano's abuser towered over her by nearly a foot and outweighed her by close to 100 pounds. But she didn't need physical strength to protect herself. She stood her ground, displayed the stun gun, and announced: "I'm not gonna take this anymore. . . . I don't wanna have to [use the stun gun on] you, but if you don't leave me alone, I'm gonna have to." The gambit worked. The ex-boyfriend "got scared and he left [her] alone."

Under Massachusetts law, however, her possession of the stun gun, "that may have saved her life made her a criminal." When it was discovered that she had the stun gun, in the context of another matter, she was charged with, and convicted of, possession of the stun gun, which was banned under state law as an "electrical weapon." Her conviction was affirmed, with the Massachusetts Supreme Judicial Court holding that it "is not the type of weapon that is eligible for Second Amendment protection" because it was "not in common use at the time of [the Second Amendment's] enactment."

Caetano requested certiorari and the U.S. Supreme Court granted review.

ISSUE: Are stun guns / electrical weapons protected under the Second Amendment?

HOLDING: Yes

DISCUSSION: The Court noted that the state court had focused on "whether a particular weapon was "'in common use at the time' of enactment of the Second Amendment." In Heller, however, the Court stated it had "emphatically rejected such a formulation."[19] Focusing on arms in existence in the 18th century was "not merely wrong, but "bordering on the frivolous."

In Heller the Court held that:

> … the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding."[20]

The Court was astounded that the Massachusetts court did not mention Heller, but seized on U.S. v. Miller, instead.[21] However, the Court said, Miller did not stand for the idea that only weapons in use in 1789 were covered, but instead simply reflected the reality that the militia of the time consisted of citizens who brought their own assortment of arms if called up. The Court noted that most of the common

[19] District of Columbia v. Heller, 554 U.S. 570 (2008).
[20] Stun guns are plainly "bearable arms." As Heller explained, the term includes any "[w]eapo[n] of offence" or "thing that a man wears for his defence, or takes into his hands," that is "carr[ied] . . . for the purpose of offensive or defensive action." 554 U. S., at 581, 584 (inter
[21] 307 U. S. 174 (1939)

firearms of today did not exist at the time, such as revolvers and semi-automatic pistols. The Court agreed that:

> Electronic stun guns are no more exempt from the Second Amendment's protections, simply because they were unknown to the First Congress, than electronic communications are exempt from the First Amendment, or electronic imaging devices are exempt from the Fourth Amendment.

The Court summarized:

> Heller defined the "Arms" covered by the Second Amendment to include "any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another."

The Court pointed out that firearms are dangerous per se, yet "cannot be categorically prohibited just because they are dangerous." Further, the Court noted "Miller and Heller recognized that militia members traditionally reported for duty carrying "the sorts of lawful weapons that they possessed at home," and that the Second Amendment therefore protects such weapons as a class, regardless of any particular weapon's suitability for military use."

In addition, the Court noted that Massachusetts has an exemption for "law enforcement and correctional officers to carry stun guns and Tasers, presumably for such purposes as nonlethal crowd control. Subduing members of a mob is little different from "suppress[ing] Insurrections," a traditional role of the militia." Some members of the military are also authorized to use such weapons against targets, as well.

The Court observed that the proper question is "whether stun guns are commonly possessed by law-abiding citizens for lawful purposes *today*." Although the Massachusetts court argued that firearms are in far more common use that electrical weapons, in fact, the Court noted, "hundreds of thousands of Tasers and stun guns have been sold to private citizens" and they are lawful to possess in 45 states.

The Court ruled that Massachusetts court seemed to be suggesting that Caetano could have "simply gotten a firearm to defend herself." However, the Court agreed, "the right to bear other weapons is 'no answer' to a ban on the possession of protected arms."

> Moreover, a weapon is an effective means of self-defense only if one is prepared to use it, and it is presumptuous to tell Caetano she should have been ready to shoot the father of her two young children if she wanted to protect herself. Courts should not be in the business of demanding that citizens use more force for self-defense than they are comfortable wielding.
>
> Countless people may have reservations about using deadly force, whether for moral, religious, or emotional reasons—or simply out of fear of killing the wrong person. "Self-defense," however, "is a basic right."[22] I am not prepared to say that a State may force an individual to choose between exercising that right and following her conscience, at least where both can be accommodated by a weapon already in widespread use across the Nation.

The Court concluded:

> A State's most basic responsibility is to keep its people safe. The Commonwealth of Massachusetts was either unable or unwilling to do what was necessary to protect Jaime Caetano, so she was forced to protect herself. To make matters worse, the Commonwealth chose to deploy its prosecutorial resources to prosecute and convict her of a criminal offense for arming herself with a nonlethal weapon that may well have saved her life. The Supreme Judicial Court then affirmed her conviction on the flimsiest of grounds. This Court's grudging per curiam now sends the case back to that same court. And the consequences for Caetano may prove more tragic still, as her conviction likely bars her from ever bearing arms for self-defense.

[22] McDonald v. City of Chicago, 561 U.S. 742 (2010).

If the fundamental right of self-defense does not protect Caetano, then the safety of all Americans is left to the mercy of state authorities who may be more concerned about disarming the people than about keeping them safe.

FORFEITURE

Luis v. U.S., --- U.S. --- (2016), Decided March 30, 2016

FACTS: In October, 2012, Luis was indicted in federal court for a variety of financial crimes involving health care. She allegedly committed fraud during which she'd obtained close to 45 million, and at the time, she had approximately 2 million in her possession. Hoping to preserve that money for payment of restitution and criminal penalties, including "criminal forfeiture[], which can include innocent – not just tainted assets," the Government obtained a court order prohibiting her from spending the money. This effectively prevented her from using her own untainted funds to hire counsel. Upon appeal, the Eleventh Circuit Court of Appeals upheld the District Court's decision.

Luis petitioned the U.S. Supreme Court for certiorari, which granted review.

ISSUE: Are a defendant's untainted funds subject to seizure prior to conviction?

HOLDING: No

DISCUSSION: The Court looked to the history of the Sixth Amendment's Right To Counsel provision. As addressed in Gideon v. Wainwright, the court noted that "even the intelligent and educated layman has small and sometimes no skill in the science of law," and without proper counsel, may be unable to prepare a good defense.[23] As such, it is a fundamental right. Further, a criminal defendant deserves a "fair opportunity to secure counsel of his own choice." However, an indigent counsel loses, to some extent, that choice to select their own counsel.

Depriving Luis of funds, in effect, denies her the "right to be represented by a qualified attorney whom she chooses and can afford." The Court differentiated the funds involved in earlier cases, noting that the funds in this case are untainted, they belong to Luis, "pure and simple." The Court stated that "the distinction … is thus an important one, not a technicality. It is the difference between what is yours and what is mine." The court noted that under old case law, only the goods and chattels that an individual holds at the time of conviction are subject to forfeiture. The Court noted that the line should distinguish between tainted funds and innocent funds needed to pay for an attorney's services.

The Court ruled that Luis had a "Sixth Amendment right to use her own 'innocent' property to pay a reasonable fee for the assistance of counsel" and vacated the lower court decisions.

DEFICIENT COUNSEL

Woods (Warden) v. Etherton, --- U.S. --- (2016), Decided April 4, 2016

FACTS: In fall, 2006, Michigan police received an anonymous tip about two white males traveling in a described vehicle in a particular area, "possibly carrying cocaine." They spotted a vehicle matching the description and stopped it for speeding. Etherton was driving, with Pollie as a passenger. A search of the vehicle revealed over 125 grams of cocaine and both were arrested.

Etherton was tried under Michigan law for possession with intent to deliver cocaine, with the central point being ownership of the drugs. Pollie testified, under a plea agreement, placing the blame on Etherton. During the trial, several officers described the tip they had received, with Etherton's counsel objecting to it, as hearsay. The issue was not actually resolved, however, as the prosecution dropped it and moved

[23] 372 U.S. 335 (1963).

on. The prosecutor did bring up the issue in closing, however. (The jury was admonished not to consider the tip evidence, but only to use is as an explanation as to why the police stopped the vehicle.)

Etherton was convicted and unsuccessfully appealed through the state courts. He took a postconviction appeal through the state courts under several issues related to the Confrontation Clause of the Sixth Amendment. When that was denied, he sought federal habeas relief under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[24] This relief is only available is the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." The District Court denied relief, but the Sixth Circuit Court of Appeals allowed the case to go forward, concluding that Etherton's counsel had been "constitutionally ineffective."

ISSUE: Is the AEDPA highly deferential to a trial court's decision as to ineffective assistance of counsel?

HOLDING: Yes

DISCUSSION: The Court agreed that for a case of alleged ineffective assistance of counsel brought under the AEDPA, the AEDPA is "doubly deferential."[25] Counsel is, by law, "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgement."[26] The Sixth Circuit had concluded that Etherton's rights under the Confrontation Clause had been violated, because it "prohibits an out-of-court statement only if it is admitted for its truth."[27] It agreed that the "contents of the tip were admitted for their truth" since it was "referenced by three different witnesses and mentioned in closing argument," far more than needed for "background." The Court had found prejudice to Etherton because the cocaine was found on the driver's side, he owned the car and he was driving the car. However, it agreed, "that evidence was not enough to convict Etherton absent Pollie's testimony." That was where the tip became a factor, as it was closely reflected by Pollie's testimony. (The Court noted that "the jury could have improperly concluded the Pollie was thereby testifying truthfully – that it was unlikely for it to be a coincidence for his testimony to line up so well with the anonymous accusation.")

The Court, however, concluded that the Sixth Circuit did not apply the proper standard under the AEDPA. The Court noted that a "fairminded jurist" could conclude there was no prejudice to Etherton by the admission of the tip as it only somewhat matched Pollie's testimony. The Court agreed that the trial counsel may have not been incompetent, but simply because the facts in the tip were not contested and did not contradict Etherton's defense at trial.

The Court reversed the decision of the Sixth Circuit.

SORNA

Nichols v. U.S., --- U.S. --- (2016), Decided April 4, 2016

FACTS: Nichols was convicted in 2003 of "intent to engage in illicit sexual conduct with a minor."[28] Although his crime pre-dated the enactment of the Sexual Offender Registration and Notification Act (SORNA),[29] he was nonetheless required to register as a sex offender in Kansas, where he lived following his release from prison. He did so, until he abruptly left Kansas and moved to the Philippines. When he failed to appear at a mandatory meeting in Kansas, a warrant was issued. He was located in the Philippines and brought back to the U.S., where he was charged with "knowingly failing to register or

[24] 28 U.S.C. 2254(d)(1).
[25] Cullen v. Pinholster, 563 U.S. 170 (2011).
[26] Strickland v. Washington, 466 U.S. 668 (1984).
[27] Crawford v. Washington, 541 U.S. 36 (2004).
[28] 18 U.S.C. §2423(b)
[29] 42 U.S.C. §16901 et seq.

update a registration as required by [SORNA]."[30] He moved for dismissal and was denied. He took a conditional guilty plea and appealed.

The Tenth Circuit Court of Appeals affirmed, holding that Kansas remained a "jurisdiction involved." That ruling conflicted with a ruling in an almost identical situation in the Eighth Circuit, in which that court held that there was no requirement to register in a former state of residence. The Supreme Court granted certiorari to resolve the conflict.

ISSUE: Is a sex offender registrant required under 18 U.S.C. §2250 to update their registration at their previous address?

HOLDING: No (but see change in statute in discussion)

DISCUSSION: The Court reviewed the history of the SORNA. Following a high profile rape and murder of a young girl, states began to enact a variety of registry and community notification laws to monitor those who had been convicted of sex crimes.[31] In 1994, the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act was enacted,[32] which provided federal funds to support state registries. By 1996, every state and the federal government had exacted similar registry laws. In 2006, the Wetterling Act was replaced by the Sex Offender Registration and Notification Act (SORNA). That made it a federal crime to fail to register as required, and to develop a process for sex offenders who move across state lines, and currently, a sex offender is required to report both to the state they are leaving and to comply with any requirements in the state they are now residing.

The Court noted that it was illogical to assume that he had to do anything further with Kansas once he relocated to Philippines. Nothing in the law required him to, in effect, "deregister" with Kansas, and had Congress wished that, they could have easily made that a requirement. In fact, that was what the Wetterling Act originally required. Kansas state law also required Nichols do that. Despite the Government's position, the Court noted, the definitions for an "involved jurisdiction" include where the individual resides, where they work or where they are a student – and none of these apply in this situation.

The Court noted that the intent of SORNA was to "make more uniform what had remained 'a patchwork of federal and 50 individual state registration systems," and to close "loopholes and deficiencies" that cause registrants to become lost in the system. But, in this case, Nichols did not violate the law with which he was charged.

However, the Court noted, Congress had very recently criminalized the "knowing failure to provide information required by SORNA relating to intended travel in foreign commerce" – known as the International Megan's Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders.[33] This new law, in fact, would have encompassed Nichols's conduct. And, of course, he did violate Kansas law by failing to report his departure. However, the Court agreed, he did not violate federal law at the time when he failed to report his departure from the United States.

The Court reversed the decision of the Tenth Circuit Court of Appeals.

NOTE: Although Kentucky law does not specifically address a subject who moves out of state, KRS 17.510 does require that a registrant must notify local probation and parole when they relocate outside of their original county of registration. Presumably, this would also be required if they leave the state or the country.

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[30] 18 U.S.C. §2250(a)(3).
[31] Smith v. Doe, 538 U.S. 84 (2003).
[32] 42 U.S.C. §14071.
[33] Pub. L. 114-119, §6(b)(2), 18 U.S.C. §16914(a)(7).

ACCA SENTENCING

Welch v. U.S., --- U.S. --- 2016, Decided April 18, 2016

FACTS: Welch is one of many offenders sentenced under the Armed Career Criminal Act (ACCA)[34] before Johnson v. U.S.[35] was decided. In 2010, he pled guilty to being a felon in possession of a firearm, with one of his three prior violent felonies being a strong-arm robbery in Florida in 1996. As such, he was sentenced under the ACCA, which made him eligible for a much more severe penalty that would have been the case otherwise. Welch was sentenced under what is called the "residual clause," which Johnson later "held to be vague and invalid." That doctrine "prohibits the government from imposing sanctions "under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." Welch argued that the Florida conviction, which was the one to which the residual clause was applied, did not qualify as a violent felony under the ACCA, but the U.S. District Court disagreed, allowing his enhanced sentence to stand. "The Johnson Court held the residual clause unconstitutional under the void-for-vagueness doctrine, a doctrine that is mandated by the Due Process Clauses of the Fifth Amendment (with respect to the Federal Government) and the Fourteenth Amendment (with respect to the States)." The primary issue is whether a particular state crime should be categorized for purposes of Johnson categorically, by the statutory elements, or by the facts of a particular case, how the crime was actually committed. He was denied a certificate to appeal when he asked to hold his case in abeyance until Johnson was resolved, as he had been sentenced under the ACCA residential clause at issue in Johnson. "The residual clause failed not because it adopted a "serious potential risk" standard but because applying that standard under the categorical approach required courts to assess the hypothetical risk posed by an abstract generic version of the offense. In the Johnson Court's view, the "indeterminacy of the wide-ranging inquiry" made the residual clause more unpredictable and arbitrary in its application than the Constitution allows."

Welch was denied, but less than three weeks later, the U.S. Supreme Court issued Johnson, which held that the "residual clause is void for vagueness." However, due to time constraints, his ability to seek reconsideration of his case had expired. Welch moved pro se for review by the U.S. Supreme Court, which granted certiorari.

ISSUE: Does Johnson v. U.S. create a new substantive rule that applies retroactively to cases on collateral review?

HOLDING: Yes

DISCUSSION: When Johnson v. U.S. was decided, it created a new rule, so they questioned remained, whether that new rule applied to cases that were currently on collateral review, as was the case for Welch. Under Teague v. Lane,[36] "as a general matter, 'new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.'" However, ""[n]ew substantive rules generally apply retroactively."[37] Second, new "'watershed rules of criminal procedure,'" which are procedural rules "implicating the fundamental fairness and accuracy of the criminal proceeding," will also have retroactive effect.[38]

Certainly, the Court agreed, Johnson is a new rule. "The question here is whether that new rule falls within one of the two categories that have retroactive effect under Teague." Both Welch and the Government argued that the rule is substantive, however, because it "alters the range of conduct or the class of persons that the law punishes."[39] Amicus, however, disagreed. The Court agreed that is it, and by "striking down the residual clause as void for vagueness, Johnson changed the substantive reach of the Armed Career Criminal Act, altering "the range of conduct or the class of persons that the [Act]

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[34] 18 U. S. C. §924(e)(2)(B)(ii).
[35] 576 U.S. --- (2015).
[36] 489 U.S. 288 (1989).
[37] Schriro v. Summerlin, 542 U. S. 348 (2004); see Montgomery v. Louisiana, 577 U. S. ___ (2016); Teague, supra.
[38] Saffle v. Parks, 494 U. S. 484 (1990).
[39] Schiro, supra.

punishes." Since prior to Johnson, a person in Welch's situation faced a higher penalty that it does, arguably, post-Johnson, he would have a lesser penalty than originally. As such, "it follows that Johnson is a substantive decision."

However, amicus briefs filed by various parties argued that the Court should "adopt a different understanding of the Teague framework. [Amicus] contends courts should apply that framework by asking whether the constitutional right underlying the new rule is substantive or procedural. Under that approach, amicus concludes that Johnson is a procedural decision because the void-for-vagueness doctrine that Johnson applied is based, she asserts, on procedural due process."

However, the Court agreed, a new rule should be classified "by considering the function of the rule, not its underlying constitutional source." Since the new rule changed "the scope of the underlying criminal proscription," it leans toward it being substantive. "It depends instead on whether the new rule itself has a procedural function or a substantive function—that is, whether it alters only the procedures used to obtain the conviction, or alters instead the range of conduct or class of persons that the law punishes."

The Court concluded that it was appropriate in this situation to remand Welch's case back to the trial court, to determine if his conviction at issue actually "qualifies as a violent felony under the elements clause of the Act, which would make Welch eligible for a 15-year sentence regardless of Johnson.

Johnson's sentencing was vacated and the case remanded.

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[40] 18 U. S. C. §924(e)(2)(B)(ii).
[41] 576 U.S. --- (2015).

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However, amicus briefs filed by various parties argued that the Court should "adopt a different understanding of the Teague framework. [Amicus] contends courts should apply that framework by asking whether the constitutional right underlying the new rule is substantive or procedural. Under that approach, amicus concludes that Johnson is a procedural decision because the void-for-vagueness doctrine that Johnson applied is based, she asserts, on procedural due process."

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The Court concluded that it was appropriate in this situation to remand Welch's case back to the trial court, to determine if his conviction at issue actually "qualifies as a violent felony under the elements clause of the Act, which would make Welch eligible for a 15-year sentence regardless of Johnson.

Johnson's sentencing was vacated and the case remanded.

FIRST AMENDMENT

Heffernan v. City of Paterson, New Jersey, --- U.S. --- (2016), Decided April 26, 2016

FACTS: In 2005, Heffernan was a Paterson, NJ, police officer. He worked in Chief Wittig's office. At that time, the incumbent mayor, Torres, was running against Spagnola. Torres had appointed both Wittig and Heffernan's immediate supervisor. Heffernan was a close friend of Spagnola.

During the campaign, Heffernan picked up a large Spagnola sign, on behalf of his mother. While at the distribution site, he spoke to campaign staff, and was seen there by police officers. "Word quickly spread

[42] 489 U.S. 288 (1989).
[43] Schriro v. Summerlin, 542 U. S. 348 (2004); see Montgomery v. Louisiana, 577 U. S. ___ (2016); Teague, supra.
[44] Saffle v. Parks, 494 U. S. 484 (1990).
[45] Schiro, supra.

throughout the force." The next day, Heffernan was demoted from detective to a patrol walking beat, as punishment for his "overt involvement." In fact, he had no involvement with the campaign at all.

Heffernan filed suit in federal court, arguing that he had been demoted "because he had engaged in conduct that (on their mistaken view of the facts) constituted protected speech." The District Court found that he was not engaged in First Amendment speech and thus, he had not been deprived of any constitutionally protected right. The Third Circuit Court of Appeals affirmed that, finding that ""a free-speech retaliation claim is actionable under §1983 only where the adverse action at issue was prompted by an employee's actual, rather than perceived, exercise of constitutional rights."

Heffernan requested certiorari and the U.S. Supreme Court granted review.

ISSUE: Does the First Amendment bar the government from demoting a public employee based on a supervisor's perception that the employee supports a political candidate?

HOLDING: Yes

DISCUSSION: The Court began, noting that "with a few exceptions, the Constitution prohibits a government employer from discharging or demoting an employee because the employee supports a particular political candidate."[46] While the "basic constitutional requirement reflects the First Amendment's hostility to government action that "prescribe[s] what shall be orthodox in politics,"[47] the "exceptions take account of 'practical realities' such as the need for 'efficiency' and 'effective[ness]' in government service."[48]

For purposes of the case, the Court assumed that the exceptions did not apply and that the "activities that Heffernan's supervisors thought he had engaged in are of a kind that they cannot constitutionally prohibit or punish.[49] As such, the supervisors were mistaken about the facts, but were motivated to take the action by their mistaken beliefs.

The Court agreed that the statute does not resolve whether the right is focused on the actual activity, or on the employer motive. In most of the prior case law, there was, in fact, no mistake, the subject was engaging in protected activity. The Court then looked to Waters v. Churchill, which is more to the point. In that case the Court did consider the consequences of an employer mistake. The employer wrongly, though reasonably, believed that the employee had spoken only on personal matters not of public concern, and the employer dismissed the employee for having engaged in that unprotected speech. The employee, however, had in fact used words that did not amount to personal "gossip" (as the employer believed) but which did, in fact, focus on matters of public concern. The Court asked whether, and how, the employer's factual mistake mattered. The Court held that, as long as the employer (1) had reasonably believed that the employee's conversation had involved personal matters, not matters of public concern, and (2) had dismissed the employee because of that mistaken belief, the dismissal did not violate the First Amendment. In a word, it was the employer's motive, and in particular the facts as the employer reasonably understood them, that mattered.

The Court agreed that "after all, in the law, what is sauce for the goose is normally sauce for the gander." The Court agreed that:

> … as in Waters, the government's reason for demoting Heffernan is what counts here. When an employer demotes an employee out of a desire to prevent the employee from engaging in political activity that the First Amendment protects, the employee is entitled to challenge that unlawful action under the First Amendment and 42 U. S. C. §1983—even if, as here, the employer makes a factual mistake about the employee's behavior.

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[46] Elrod v. Burns, 427 U. S. 347 (1976); Branti v. Finkel, 445 U. S. 507 (1980).
[47] West Virginia Bd. of Ed. v. Barnette, 319 U. S. 624 (1943)
[48] Waters v. Churchill, 511 U. S. 661, 672 (1994); Civil Service Comm'n v. Letter Carriers, 413 U. S. 548 (1973)
[49] Rutan v. Republican Party of Ill., 497 U. S. 62 (1990) ("joining, working for or contributing to the political party and candidates of their own choice"),

The Court continued:

> The constitutional harm at issue in the ordinary case consists in large part of discouraging employees—both the employee discharged (or demoted) and his or her colleagues—from engaging in protected activities. The discharge of one tells the others that they engage in protected activity at their peril. Hence, we do not require plaintiffs in political affiliation cases to "prove that they, or other employees, have been coerced into changing, either actually or ostensibly, their political allegiance."[50] The employer's factual mistake does not diminish the risk of causing precisely that same harm. Neither, for that matter, is that harm diminished where an employer announces a policy of demoting those who, say, help a particular candidate in the mayoral race, and all employees (including Heffernan), fearful of demotion, refrain from providing any such help.[51] The upshot is that a discharge or demotion based upon an employer's belief that the employee has engaged in protected activity can cause the same kind, and degree, of constitutional harm whether that belief does or does not rest upon a factual mistake.

The Court agreed that to win, an "employee must prove an improper employer motive." In this situation, there is at least some evidence that Heffernan's dismissal may have occurred "pursuant to a different and neutral policy prohibiting police officers from overt involvement in any political campaign. " For that reason, the Court reversed the lower courts and remanded the case for further proceedings.

Of special note to Kentucky officers: KRS 95.017, KRS 95.470 and 95.762.

HOBBS ACT

Ocasio v. U.S., --- U.S. --- (2016)
Decided May 2, 2016

FACTS: Moreno-Mejia (known as Moreno) and Mejia (known as Mejia) are "brothers who co-owned and operated the Majestic Auto Repair Shop (Majestic)." In 2008, with the business struggling, they made a deal with Officer Corona (Baltimore PD) that "in exchange for kickbacks, Officer Corona would refer motorists whose cars were damaged in accidents to Majestic for towing and repairs. Officer Corona then spread the word to other members of the force, and eventually as many as 60 other officers sent damaged cars to Majestic in exchange for payments of $150 to $300 per referral." Ocasio became part of the scheme in 2009 and made several referrals. The scheme was "highly successful: It substantially increased Majestic's volume of business and profits, and by early 2011 it provided Majestic with at least 90% of its customers."

In 2011, with the scheme discovered, ten officers and the two shopowners were indicted. Most of the officers pled guilty, but Ocasio did not. He was charged with "three counts of violating the Hobbs Act, 18 U. S. C. §1951, by extorting money from Moreno with his consent and under color of official right. As all parties agree, the type of extortion for which [Ocasio] was convicted— obtaining property from another with his consent and under color of official right—is the "rough equivalent of what we would now describe as 'taking a bribe.'"[52] To prove this offense, the Government 'need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts.'" Ocasio and Manrich, another officer, were also charged with Conspiracy under 18 U.S.C. 371, to commit the substantive Hobbs Act offenses.

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[50] Branti, supra.
[51] Cf. Gooding v. Wilson, 405 U. S. 518 (1972) (explaining that overbreadth doctrine is necessary "because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions").
[52] Evans v. U.S., 504 U. S. 255 (1992).

Ocasio went to trial[53] After a debate over jury instructions, the court provided an instruction in which the jury was told that:

> In order to convict petitioner of the conspiracy charge, the jury was told, the prosecution was required to prove (1) that two or more persons entered into an unlawful agreement; (2) that petitioner knowingly and willfully became a member of the conspiracy; (3) that at least one member of the conspiracy knowingly committed at least one overt act; and (4) that the overt act was committed to further an objective of the conspiracy. The court "caution[ed]" "that mere knowledge or acquiescence, without participation in the unlawful plan, is not sufficient" to demonstrate membership in the conspiracy. Rather, the court explained, the conspirators must have had "a mutual understanding . . . to cooperate with each other to accomplish an unlawful act," and petitioner must have joined the conspiracy "with the intention of aiding in the accomplishment of those unlawful ends."

Ocasio was convicted on all charges. He appealed, and the Fourth Circuit Court of Appeals rejected his argument that his "his conspiracy conviction was fatally flawed because the conspirators had not agreed to obtain money from a person who was not a member of the conspiracy" and affirmed his convictions.

Ocasio requested certiorari and the U.S. Supreme Court granted review.

ISSUE: Does a conspiracy to commit extortion require that the conspirators agree to obtain property from someone <u>outside</u> the conspiracy?

HOLDING: No

DISCUSSION: The Court began, noting that "Under longstanding principles of conspiracy law, a defendant may be convicted of conspiring to violate the Hobbs Act based on proof that he entered into a conspiracy that had as its objective the obtaining of property from another conspirator with his consent and under color of official right." Under the federal conspiracy statute, it is a crime to ""conspire . . . to commit any offense against the United States."[54] However, "Although conspirators must "pursue the same criminal objective," "a conspirator [need] not agree to commit or facilitate each and every part of the substantive offense."[55] In addition, ""[i]f conspirators have a plan which calls for some conspirators to perpetrate the crime and others to provide support, the supporters are as guilty as the perpetrators."

The Court continued:

> In order to establish the existence of a conspiracy to violate the Hobbs Act, the Government has no obligation to demonstrate that each conspirator agreed personally to commit—or was even capable of committing—the substantive offense of Hobbs Act extortion. It is sufficient to prove that the conspirators agreed that the underlying crime be committed by a member of the conspiracy who was capable of committing it. In other words, each conspirator must have specifically intended that some conspirator commit each element of the substantive offense.

In this case, Ocasio, Moreno and Mejia "share[d] a common purpose" – which was that Ocasio and "other police officers would commit every element of the substantive extortion offense." Specifically, the officers "would obtain property "under color of official right," something that Moreno and Mejia were incapable of doing because they were not public officials."

The Court noted that Ocasio did not appeal that he committed the underlying, substantive Hobbs Act violations – and "under well-established rules of conspiracy law, petitioner was properly charged with and convicted of conspiring with the shopowners." The Court agreed that "mere acquiescence" was not enough, however, but an overt act was needed, but found that it was present in this case. With respect to

[53] Manrich took a guilty plea before the trial was ended.
[54] 18 U. S. C. §371
[55] <u>Salinas v. U.S.</u>, 522 U. S. 52 (1997).

the "from another," language, however, the Court further agreed that the source of the actual money was immaterial.

The Court concluded that Ocasio "may be convicted of conspiring to violate the Hobbs Act based on proof that he reached an agreement with the owner of the property in question to obtain that property under color of official right. Because petitioner joined such an agreement, his conspiracy conviction must stand."

The judgment of the United States Court of Appeals for the Fourth Circuit was affirmed.

HOBBS ACT

Taylor v. U.S.,579 U.S. --- (2016), Decided June 20, 2016

FACTS: As early as 2009, a gang called Southwest Goonz "committed a series of home invasion robberies targeting drug dealers in the area of Roanoke, Virginia." "For obvious reasons, drug dealers are more likely than ordinary citizens to keep large quantities of cash and illegal drugs in their homes and are less likely to report robberies to the police." Taylor was arrested for two counts of robbery under the Hobbs Act, and one firearms charge. In the first one, the robbers were looking for drugs and money, but left with only a small amount of loot, including a single marijuana cigarette. The second, attempted, robbery occurred, but in this case, they only made off with a cell phone. In both cases, the victims were drug dealers presumed to have money and cash on hands.

After his first trial, the jury hung. At the second trial, Taylor was prevented "from introducing evidence that the drug dealers he targeted might be dealing in only locally grown marijuana." The Court denied several motions and Taylor was convicted. His appeal was affirmed by the Fourth Circuit Court of Appeals. Taylor then requested certiorari from the U.S. Supreme Court, and review was granted.

ISSUE; Is the Government relieved of proving beyond a reasonable doubt the interstate commerce element by relying exclusively on evidence that the robbery or attempted robbery of a drug dealer is an inherent economic enterprise that satisfies, as a matter of law, the interstate commerce element of the offense?

HOLDING: Yes

DISCUSSION: Taylor was charged and convicted under the Hobbs Act, which makes it a federal crime "for a person to affect commerce, or to attempt to do so, by robbery.[56] Commerce if very broadly defined as "interstate commerce" over which the U.S. has jurisdiction. In this case, the Court was required "to decide what the Government must prove to satisfy the Hobbs Act's commerce element when a defendant commits a robbery that targets a marijuana dealer's drugs or drug proceeds." The Court looked to Gonzales v. Raich[57] which found that the "Commerce Clause gives Congress authority to regulate the national market for marijuana, including the authority to proscribe the purely intrastate production, possession, and sale of this controlled substance." As such, the Court agreed, "Congress may also regulate intrastate drug *theft*." Further, "'since the Hobbs Act criminalizes robberies and attempted robberies that affect any commerce "over which the United States has jurisdiction,' §1951(b)(3), the prosecution in a Hobbs Act robbery case satisfies the Act's commerce element if it shows that the defendant robbed or attempted to rob a drug dealer of drugs or drug proceeds."

The court noted that the Hobbs Act is unmistakably very broad and its sweep has been noted in prior cases. The Court agreed that selling marijuana is "unquestionably an economic activity" even though it is "to be sure, a form of business that is illegal under federal law and the laws of most States. But there can be no question that marijuana trafficking is a moneymaking endeavor—and a potentially lucrative one at that."

[56] 18 U. S. C. §1951(a).
[57] 545 U. S. 1 (2005),

The Court agreed that "if the Government proves beyond a reasonable doubt that a robber targeted a marijuana dealer's drugs or illegal proceeds, the Government has proved beyond a reasonable doubt that commerce over which the United States has jurisdiction was affected."

The Court emphasized:

> In order to obtain a conviction under the Hobbs Act for the robbery or attempted robbery of a drug dealer, the Government need not show that the drugs that a defendant stole or attempted to steal either traveled or were destined for transport across state lines. Rather, to satisfy the Act's commerce element, it is enough that a defendant knowingly stole or attempted to steal drugs or drug proceeds, for, as a matter of law, the market for illegal drugs is "commerce over which the United States has jurisdiction." And it makes no difference under our cases that any actual or threatened effect on commerce in a particular case is minimal.[58]

The Court limited its holding "to cases in which the defendant targets drug dealers for the purpose of stealing drugs or drug proceeds." The Court them affirmed the holding of the Fourth Circuit and upheld Taylor's convictions.

SEARCH & SEIZURE

Utah v. Strieff, 579 U.S. --- (2016), Decided June 20, 2016

FACTS: On December 2006, the South Salt Lake City police drug-tip line received an anonymous tip about "narcotics activity" at a particular address in that city. Det. Fackrell was assigned to investigate. "Over the course of about a week, Officer Fackrell conducted intermittent surveillance of the home. He observed visitors who left a few minutes after arriving at the house. These visits were sufficiently frequent to raise his suspicion that the occupants were dealing drugs."

Strieff was one of the visitors observed by Office Fackrell. After he left the house, he went to a local convenience store. There, in the parking lot "Officer Fackrell detained Strieff, identified himself, and asked Strieff what he was doing at the residence." He requested ID and received a Utah ID card. With that, the officer learned that Strieff had an outstanding traffic warrant. He was arrested and searched, the officer "discovered a baggie of methamphetamine and drug paraphernalia."

He was charged with unlawful possession of the methamphetamine and the drug paraphernalia. He moved to suppress, arguing that the initial detention was unlawful. "At the suppression hearing, the prosecutor conceded that Officer Fackrell lacked reasonable suspicion for the stop but argued that the evidence should not be suppressed because the existence of a valid arrest warrant attenuated the connection between the unlawful stop and the discovery of the contraband." The trial court agreed and admitted the evidence.

The trial court went on to find that "the short time between the illegal stop and the search weighed in favor of suppressing the evidence, but that two countervailing considerations made it admissible.

> First, the court considered the presence of a valid arrest warrant to be an "'extraordinary intervening circumstance.'"[59] Second, the court stressed the absence of flagrant misconduct by Officer Fackrell, who was conducting a legitimate investigation of a suspected drug house.

Strieff took a conditional guilty plea and appealed. The Utah Court of Appeals affirmed, but the Utah Supreme Court reversed, holding that "the evidence was inadmissible because only "a voluntary act of a defendant's free will (as in a confession or consent to search)" sufficiently breaks the connection between an illegal search and the discovery of evidence. Because Officer Fackrell's discovery of a valid arrest

[58] See Perez v. U.S., 402 U. S. 146 (1971).
[59] App. to Pet. for Cert. 102 (quoting U.S. v. Simpson, 439 F. 3d 490 (CA8 2006).

warrant did not fit this description, the court ordered the evidence suppressed. " Utah requested certiorari and the U.S. Supreme Court granted review.

ISSUE: Should evidence seized incident to a lawful arrest on an outstanding warrant be suppressed because the warrant was discovered during an investigatory stop later found to be unlawful?

HOLDING: No

DISCUSSION: The Court agreed to review, to resolve a conflict in the circuits as to "how the attenuation doctrine applies where an unconstitutional detention leads to the discovery of a valid arrest warrant."

The Court began:

> The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Because officers who violated the Fourth Amendment were traditionally considered trespassers, individuals subject to unconstitutional searches or seizures historically enforced their rights through tort suits or self-help.[60] In the 20th century, however, the exclusionary rule—the rule that often requires trial courts to exclude unlawfully seized evidence in a criminal trial—became the principal judicial remedy to deter Fourth Amendment violations.[61]
>
> Under the Court's precedents, the exclusionary rule encompasses both the "primary evidence obtained as a direct result of an illegal search or seizure" and, relevant here, "evidence later discovered and found to be derivative of an illegality," the so-called "'fruit of the poisonous tree.'"[62] But the significant costs of this rule have led us to deem it "applicable only . . . where its deterrence benefits outweigh its substantial social costs.[63] "Suppression of evidence . . . has always been our last resort, not our first impulse."

In the past, the Court had recognized several exceptions to the usual rule.

> Three of these exceptions involve the causal relationship between the unconstitutional act and the discovery of evidence. First, the independent source doctrine allows trial courts to admit evidence obtained in an unlawful search if officers independently acquired it from a separate, independent source.[64] Second, the inevitable discovery doctrine allows for the admission of evidence that would have been discovered even without the unconstitutional source.[65] Third, and at issue here, is the attenuation doctrine: Evidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that "the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained."[66]

The Court began with the threshold question – "whether this doctrine applies at all to a case like this, where the intervening circumstance that the State relies on is the discovery of a valid, pre-existing, and untainted arrest warrant." The Court agreed that the "attenuation doctrine evaluates the causal link between the government's unlawful act and the discovery of evidence, which often has nothing to do with a defendant's actions."

The Court was left to "address whether the discovery of a valid arrest warrant was a sufficient intervening event to break the causal chain between the unlawful stop and the discovery of drug-related evidence on Strieff 's person."

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[60] Davies, Recovering the Original Fourth Amendment, 98 Mich. L. Rev. 547, 625 (1999).
[61] See, e.g., Mapp v. Ohio, 367 U. S. 643 (1961).
[62] Segura v. U.S., 468 U. S. 796 (1984).
[63] Hudson v. Michigan, 547 U. S. 586 (2006) (internal quotation marks omitted).
[64] See Murray v. U.S., 487 U. S. 533 (1988).
[65] See Nix v. Williams, 467 U. S. 431, 443–444 (1984).
[66] Hudson, supra.

> The three factors articulated in Brown v. Illinois guide our analysis.[67] First, we look to the "temporal proximity" between the unconstitutional conduct and the discovery of evidence to determine how closely the discovery of evidence followed the unconstitutional search. Second, we consider "the presence of intervening circumstances." Third, and "particularly" significant, we examine "the purpose and flagrancy of the official misconduct.". In evaluating these factors, we assume without deciding (because the State conceded the point) that Officer Fackrell lacked reasonable suspicion to initially stop Strieff. And, because we ultimately conclude that the warrant breaks the causal chain, we also have no need to decide whether the warrant's existence alone would make the initial stop constitutional even if Officer Fackrell was unaware of its existence."

In this case, the temporal proximity factor favors the suppression of the evidence, as the illegal contraband was found only minutes after the illegal stop. However, the presence of intervening circumstances strongly favored Utah, as in Segura, "the existence of a valid warrant favors finding that the connection between unlawful conduct and the discovery of evidence is "sufficiently attenuated to dissipate the taint." The warrant was valid, predated the investigation and was "entirely unconnected with the stop." Once the officer discovered the warrant, he had an obligation to make the arrest, it was "a ministerial act that was independently compelled by the pre-existing warrant." And of course, once arrested, "it was undisputedly lawful to search Strieff as an incident of his arrest to protect Officer Fackrell's safety." The third factor also strongly favored Utah, as at most, the officer was negligent, as he failed to follow-through on the information he had to determine whether Strieff, in particular, was a short term visitor. He "should have asked Strieff whether he would speak with him, instead of demanding that Strieff do so – and "nothing prevented him from approaching Strieff simply to ask."[68] However, even if his decision was mistaken, it did not rise to a "purposeful or flagrant violation of Strieff's Fourth Amendment rights."

And after the stop, "his conduct thereafter was lawful." It was appropriate to run a warrant check for safety, and once the warrant was found and the arrest made, the search itself was a lawful search incident to arrest. Nothing indicated that "this unlawful stop was part of any systemic or recurrent police misconduct." It was at most an isolated incident of negligence.

The Court held that the evidence was admissible because the unlawful stop was sufficiently attenuated by the pre-existing arrest warrant." Further, the "outstanding arrest warrant for Strieff's arrest is a critical intervening circumstances that his wholly independent of the illegal stop." When the warrant was discovered, it "broke the causal chain between the unconstitutional stop and the discovery of evidence by compelling Officer Fackrell to arrest Strieff." The Court found it "especially significant that there is no evidence that Officer Fackrell's illegal stop reflected flagrantly unlawful police misconduct."

The Court concluded that the evidence seized is admissible because the officer's "discovery of the arrest warrant attenuated the connection between the unlawful stop and the evidence seized from Strieff incident to arrest." The decision of the Utah Supreme Court is reversed.

ACCA

Mathis v. U.S., --- U.S. --- (2016), Decided June 23, 2016

FACTS: Mathis pled guilty in Iowa for being a felon in possession of a firearm.[69] At sentencing, the prosecution asked that his sentence be enhanced under the Armed Career Criminal Act,[70] which carries an additional 15-year penalty, because Mathis had five prior state burglary convictions. Iowa's burglary statute "covers more than generic burglary does," by reaching in broader areas, including vehicles. The Iowa statute does not consider the various locations to be "alternative elements, going

[67] 422 U. S. 590 (1975),
[68] Florida v. Bostick, 501 U.S. 429 (1991).
[69] 18 U.S.C. §922(g).
[70] 18 U.S.C. §924(e).

toward the creation of separate crimes," but "to the contrary, they lay out alternatives ways of satisfying a single locational element."[71] After looking at the specific records on his prior convictions, which indicated that Mathis had burgled structures, rather than vehicles, the District Court imposed the additional sentence.

The Eighth Circuit affirmed, which set up a conflict in the federal circuits as to how such an issue would be resolved. Mathis sought certiorari and the U.S. Supreme Court granted review.

ISSUE: Does the application of the ACCA involve only comparing elements, rather than facts?

HOLDING: Yes

DISCUSSION: The Court looked to precedent cases, "which have repeatedly held, and in no uncertain terms, that a state crime cannot qualify as an ACCA predicate if its elements are broader than those of a listed generic offense."[72]

The "underlying brute facts or means" by which the defendant commits his crime, make no difference; even if the defendant's conduct, in fact, fits within the definition of the generic offense, the mismatch of elements saves him from an ACCA sentence. ACCA requires a sentencing judge to look only to "the elements of the [offense], not to the facts of [the] defendant's conduct."[73]

The Court noted that the language of the statute was controlling, and that:

> …construing ACCA to allow a sentencing judge to go any further would raise serious Sixth Amendment concerns because only a jury, not a judge, may find facts that increase the maximum penalty.[74] And third, an elements-focus avoids unfairness to defendants, who otherwise might be sentenced based on statements of "nonelemental fact[s]" that are prone to error because their proof is unnecessary to a conviction.[75]

This case involved a situation with an:

> … alternatively phrased law: not one that lists multiple elements disjunctively, but instead one that enumerates various factual means of committing a single element.[76] To use a hypothetical adapted from two of our prior decisions, suppose a statute requires use of a "deadly weapon" as an element of a crime and further provides that the use of a "knife, gun, bat, or similar weapon" would all qualify. Because that kind of list merely specifies diverse means of satisfying a single element of a single crime—or otherwise said, spells out various factual ways of committing some component of the offense—a jury need not find (or a defendant admit) any particular item: A jury could convict even if some jurors "conclude[d] that the defendant used a knife" while others "conclude[d] he used a gun," so long as all agreed that the defendant used a "deadly weapon."

The Court agreed that the "ACCA's use of the term 'convictions' still supports an elements-based inquiry; indeed, that language directly refutes an approach that would treat as consequential a statute's reference to factual circumstances not essential to any conviction. Similarly, the Sixth Amendment problems associated with a court's exploration of means rather than elements do not abate in the face of a statute like Iowa's: Whether or not mentioned in a statute's text, alternative factual scenarios remain just that—and so remain off-limits to judges imposing ACCA enhancements. And finally, a statute's listing of disjunctive means does nothing to mitigate the possible unfairness of basing an increased penalty on something not legally necessary to a prior conviction. Whatever the statute says, or leaves out, about

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[71] In other words, the jury doesn't have to agree on the location, only that one of the listed locations was involved.
[72] Taylor v. U.S., 495 U. S. 575 (1990)
[73] Richardson v. U.S., 526 U. S. 813 (1999).
[74] See Apprendi v. New Jersey, 530 U. S. 466 (2000).
[75] Descamps v. U.s., 570 U. S. ___, 2013.
[76] See generally Schad v. Arizona, 501 U. S. 624 (1991) (plurality opinion) ("[L]egislatures frequently enumerate alternative means of committing a crime without intending to define separate elements or separate crimes").

diverse ways of committing a crime makes no difference to the defendant's incentives (or lack thereof) to contest such matters."

In this case, "because the elements of Iowa's burglary law are broader than those of generic burglary, Mathis's convictions under that law cannot give rise to an ACCA sentence." The Court reversed the decision of the Eighth Court of Appeals.

DUI / IMPLIED CONSENT

Birchfield v. North Dakota, --- U.S. --- (2016) (Three cases consolidated upon appeal)
Decided June 23, 2016

NOTE: *While it remains to be seen how courts will interpret it, the Legal Staff believes that the decision of the U.S. Supreme Court in the case of Birchfield v. North Dakota should have little impact on Kentucky DUI laws, nor on how officers enforce them.*

At issue in Birchfield were the laws of the states of North Dakota and Minnesota which made it a separate criminal offense to refuse blood alcohol testing if the defendant was arrested for motor vehicle DUI. Because of those laws, it arguably made the obtaining of a sample of a person's breath, or blood a coercive seizure. The Court held that the breath test was allowable under the doctrine of search incident to arrest and no warrant was necessary for that. However, because of the intrusive nature of a blood test, a blood draw would require a warrant. The Court did not disapprove of administrative penalties for refusal to submit to testing under implied consent. Therefore, a subject having his operator's license suspended as a consequence of a refusal was upheld.

In Kentucky, per KRS 189A.010(11), a refusal to submit to blood alcohol or substance testing would be an aggravating factor in a Motor Vehicle DUI case. Under KRS 189A.010(5), the aggravating factor would lead to a potential increase in punishment for the underlying DUI charge. However, if the subject was acquitted, while the subject would still be subject to the operator's license suspension for the refusal, the subject is not criminally punished in any way. This clearly distinguishes Kentucky law from that of North Dakota and Minnesota. In those states, even if a defendant was acquitted of the underlying offense of DUI, he or she would still face criminal liability for having refused the test in addition to the administrative punishment of license suspension.

However, Boating Under the Influence, KRS 235.240, does appear to provide for a separate criminal penalty simply for refusal, and that might present a legal issue as a result of Birchfield. .

As always, law enforcement agencies are encouraged to bring questions and concerns to local prosecutors. As this is such a new issue, it is anticipated that there will be many questions in upcoming months, until the appellate courts have an opportunity to weigh in on specific situations.

FACTS: In the first case, in North Dakota v. Birchfield, on October 10, 2013, "Birchfield drove into a ditch in Morton County." A responding officer, believing him to be intoxicated, administered field sobriety tests. Birchfield failed. A PBT gave a result of .254. Birchfield was arrested and given the implied consent advisory; he refused the test.

Birchfield was charged with refusing to submit to the test. The North Dakota trial court upheld the charge. Birchfield took a conditional guilty plea and appealed it through the state judicial system. The North Dakota appellate court agreed that "driving is a privilege, not a constitutional right and is subject to reasonable control by the State under its police power." It looked to Missouri v. McNeely, in which the Court had held that ""in drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a

warrant."[77] The McNeely court had "rejected the notion that Schmerber established that natural dissipation of alcohol in the bloodstream is a per se exigency that suffices to justify an exception to the warrant requirement, and interpreted Schmerber to require a "totality of the circumstances approach."[78] In that case, the Court had further noted that all 50 states have implied consent laws that provide for a penalty if they refuse a test. As a result of that case, the North Dakota courts had "have held that consent to a chemical test is not coerced and is not rendered involuntary merely by a law enforcement officer's reading of the implied consent advisory that accurately informs the arrestee of the consequences for refusal, including the administrative and criminal penalties, and presents the arrestee with a choice." The Court agreed that ""the State's interest in decreasing drunk driving is a valid public concern. Indeed, "[n]o one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it. Media reports of alcohol-related death and mutilation on the Nation's roads are legion." The North Dakota court upheld the criminal judgement.

In Bernard v. Minnesota, South St. Paul police received a call about three drunken men who had gotten their truck stuck while trying to pull a boat from the river at a public ramp. When the officers arrived, they were directed by witnesses to a "stumbling, underwear-clad man" (Bernard) and were told he was the truck driver. Bernard's truck was hanging over the edge of the ramp's pavement but none of the three men presented admitted to driving it. Officers focused on Bernard, however, because he was dressed as the 911 call had indicated and witnesses had identified him as the driver of the vehicle. The officers could smell alcoholic beverages on Bernard's breath and his eyes were bloodshot and watery. Bernard admitted he had been drinking, denied driving, but was holding the truck keys. He refused to take any field sobriety tests and was arrested.

At the station, Bernard was read the implied consent advisory and given an opportunity to call an attorney. He refused to take the breath test; he was then charged with DWI and the test refusal. Bernard moved for dismissal, arguing that the test-refusal statute was unconstitutional. The lower court agreed that his conduct in refusing could not be considered criminal and the state appealed. Under Minnesota case law, the state's highest court ruled that the officer had the option of getting a warrant to obtain blood, which he did not do, instead giving Bernard the option to take a voluntary warrantless test. The Court ruled that Minnesota "is not constitutionally precluded from criminalizing a suspected drunk driver's refusal to submit to a chemical test under circumstances in which the requesting officer had grounds to have obtained a constitutional reasonable nonconsensual chemical test by securing and executing a warrant requiring the driver to submit to testing."

Finally, also in North Dakota, in Beylund v. Levi, a Bowman police officer responded to a call of an "unwanted person." He observed a vehicle matching the description provided in the call. He saw the vehicle "nearly hit a stop sign while making a right hand turn into a driveway." The vehicle then stopped, partially in the roadway. The police officer testified he pulled up and stopped behind the vehicle, without activating his patrol car's emergency lights, and approached the vehicle "to make sure everything was fine with the individual or what was going on."

As the officer approached, he spotted an empty wine glass in the center console and the odor of alcohol coming from the vehicle. He returned to his vehicle and turned on the emergency lights. Beylund, the driver, refused to get out until the officer opened the car door and demanded it. As he got out, he "struggled with his balance and was generally uncooperative." He refused all field sobriety tests, claiming to have a "bad leg." He could not provide an adequate sample for the PBT. Beylund was taken to the hospital and given the implied consent, he agreed to a blood test with showed a result of 0.250. He was convicted of DUI and his license suspended for two years. He argued for reconsideration, on the grounds that the "blood test was an unconstitutional warrantless search, without a valid exception to the warrant requirement, and North Dakota's implied consent law violates the unconstitutional conditions doctrine." He was unsuccessful and ultimately, the appellate court upheld his conviction, finding his consent valid.

[77] 133 S.Ct. 1552 (2013)
[78] Schmerber v. California, 384 U.S. 757 (1966).

In all three of the above cases, the cases were appealed and the U.S. Supreme Court granted review. Further, the Court consolidated the cases for purposes of final argument and decision.

ISSUE: May a State may make it a crime for a person to refuse to take a chemical test to detect the presence of alcohol in the person's blood?

HOLDING: Yes, for Breath Testing, No for Blood Testing

DISCUSSION: The Court began by nothing that:

> Drunk drivers take a grisly toll on the Nation's roads, claiming thousands of lives, injuring many more victims, and inflicting billions of dollars in property damage every year. To fight this problem, all States have laws that prohibit motorists from driving with a blood alcohol concentration (BAC) that exceeds a specified level. But determining whether a driver's BAC is over the legal limit requires a test, and many drivers stopped on suspicion of drunk driving would not submit to testing if given the option. So every State also has long had what are termed "implied consent laws." These laws impose penalties on motorists who refuse to undergo testing when there is sufficient reason to believe they are violating the State's drunk-driving laws. In the past, the typical penalty for noncompliance was suspension or revocation of the motorist's license. The cases now before us involve laws that go beyond that and make it a crime for a motorist to refuse to be tested after being lawfully arrested for driving while impaired. The question presented is whether such laws violate the Fourth Amendment's prohibition against unreasonable searches.

The Court looked at the history of the issue, which "arose almost as soon as motor vehicles came into use." The early laws did not provide for a "statistical definition of intoxication," but depended upon the outward signs alone. By 1940, however, the first law that included a "presumptive intoxication" standard had been past, and states followed suit, eventually settling on .10 as the per se level. That required a test, either by using a sample of the driver's blood, but many states prohibit a forcible immobilization for that purpose.[79] During the 1930s, as well, the first machine for breath testing was developed, called the Drunkometer. The Breathalyzer came into use in the 1950s, based on the same principles. Over time, improved equipment became available, under different brand names, but all have to be approved by the National Highway Traffic Safety Administration and are considered very reliable.

However, the Court noted, "[m]easurement of BAC based on a breath test requires the cooperation of the person being tested." As such, states had to find a way to secure the cooperation of the subject, and the "so-called 'implied consent' laws were enacted to achieve this result." Today, all states have some form of a law that permits suspension or revocation of an operator's license for recidivists. However, over time, and through changes in the underlying DUI laws, the "effectiveness of implied consent laws," have been undermined. For example, if the penalty for the underlying offense is higher than the penalty for refusal, the subject might refuse. To combat that, some states have criminalized refusal, including Minnesota and North Dakota, and as a result, the percentage of refusals in that state falls well below the national average.[80]

In the facts at bar, the Court noted that despite the differences in the cases, "success for all three … depends on the proposition that the criminal law ordinarily may not compel a motorist to submit to the taking of a blood sample or to a breath test unless a warrant authorizing such testing is issued by a magistrate."

> If, on the other hand, such warrantless searches comport with the Fourth Amendment, it follows that a State may criminalize the refusal to comply with a demand to submit to the required testing, just as a State may make it a crime for a person to obstruct the execution of a valid search warrant.

[79] See North Dakota v. Neville, 459 U. S. 553 (1983).
[80] KRS 189A.010(11)(e).

The Court looked to the Fourth Amendment and noted that it has "previously had occasion to examine whether one such exception—for 'exigent circumstances'—applies in drunk-driving investigations." The exigent circumstances exception allows a warrantless search when an emergency leaves police insufficient time to seek a warrant."[81]

Further:

> In Schmerber v. California, we held that drunk driving may present such an exigency. There, an officer directed hospital personnel to take a blood sample from a driver who was receiving treatment for car crash injuries.[82] The Court concluded that the officer "might reasonably have believed that he was confronted with an emergency" that left no time to seek a warrant because "the percentage of alcohol in the blood begins to diminish shortly after drinking stops." On the specific facts of that case, where time had already been lost taking the driver to the hospital and investigating the accident, the Court found no Fourth Amendment violation even though the warrantless blood draw took place over the driver's objection.

However, the natural dissipation of alcohol from the bloodstream "does not always constitute an exigency justifying the warrantless taking of a blood sample."[83] The Court emphasized that exigency must be assessed on a "careful case-by-case assessment." The Court agreed, however, that other rules might apply, such as the "long-established rule that a warrantless search may be conducted incident to a lawful arrest." As such, the Court concluded that since "the drivers were searched or told that they were required to submit to a search after being placed under arrest for drunk driving. We therefore consider how the search-incident-to-arrest doctrine applies to breath and blood tests incident to such arrests."

The Court then looked at the "ancient pedigree" of the "search-incident-to-arrest doctrine" which had been part of law enforcement practice for many, many years. As body searches (not body cavity) had been the norm when the Fourth Amendment was established, their "constitutionality can not be doubted." Instead they were uncontested and broadly accepted. It became fixed in American law with Weeks v. U.S.[84] The Court grappled with the "question of the authority of arresting officers to search the area surrounding the arrestee, and our decisions reached results that were not easy to reconcile."[85] Finally, in Chimel v. California, the Court settled on allowing a search of the person and the "area 'within his immediate control.'"[86] That was further clarified in U.S. v. Robinson, in which the court held that no case by case assessment need be made, that such a search could be done categorically.[87]

The Court noted that "

> The permissibility of such searches, we held, does not depend on whether a search of a particular arrestee is likely to protect officer safety or evidence: "The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect." Ibid. Instead, the mere "fact of the lawful arrest" justifies "a full search of the person."

Most recently, in Riley v. California, the court reaffirmed Robinson and "explained how the rule should be applied in situations that could not have been envisioned when the Fourth Amendment was adopted." To do so, the Court noted ""we generally determine whether to exempt a given type of search from the warrant requirement 'by assessing, on the one hand, the degree to which it intrudes upon an individual's

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[81] Michigan v. Tyler, 436 U. S. 499 (1978).
[82] Supra.
[83] Missouri v. McNeely, 133 S.Ct. 1552 (2013).
[84] 232 U. S. 383, 392 (1914).
[85] See, e.g., U.S. v. Lefkowitz, 285 U. S. 452(1932) (forbidding "unrestrained" search of room where arrest was made); Harris v. U.S., 331 U. S. 145, 149 (1947) (permitting complete search of arrestee's four-room apartment); U.S. v. Rabinowitz, 339 U. S. 56 (1950) (permitting complete search of arrestee's office)
[86] 395 U. S. 752 (1969),
[87] U.S. v. Robinson, 414 U.S. 218 (1973).

privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'"

Although "blood and breath tests to measure blood alcohol concentration are not as new as searches of cell phones," the Court still had to use the same mode of analysis. The Court began by considering the individual privacy interests inherent in each test. In Skinner, the Court had ruled that there were no "significant privacy concerns" in breath testing, and the Court agreed, that was still the case today.[88]

> First, the physical intrusion is almost negligible. Breath tests "do not require piercing the skin" and entail "a minimum of inconvenience." As Minnesota describes its version of the breath test, the process requires the arrestee to blow continuously for 4 to 15 seconds into a straw-like mouthpiece that is connected by a tube to the test machine. Independent sources describe other breath test devices in essentially the same terms. The effort is no more demanding than blowing up a party balloon.

The Court contrasted the process with other tests it has approved, such as buccal swabs for DNA and fingernail scrapings, and found breath testing to be negligible.[89] If anything, a breath test reveals less than a DNA test might. Further, it is done in a private place, when someone is already under arrest.

Blood testing, however, is a "different matter," as it requires a piercing of the skin and a removal of something from the body, by force. Air is shed constantly, blood, however, is not. The Court noted that a blood test is not something most people relish. That is why motorists are given the choice in most instances, of which test to take. (And like a DNA swab, blood may reveal far more than the amount of alcohol.)

The Court then looked at the interest of the States. The Court agreed that preserving public safety on the highways is of "paramount interest."[90] Although diminishing, the death and injury toll, which the court went so far as to call "carnage" and "slaughter," on the highway from impaired drivers is still far too high. To deter such driving, the States have enacted increasing onerous penalties. The Court agreed the license suspension is unlikely to persuade the most serious offenders, but noted that the "the laws at issue in the present cases—which make it a crime to refuse to submit to a BAC test—are designed to provide an incentive to cooperate in such cases, and we conclude that they serve a very important function."

The Court noted:

> If a search warrant were required for every search incident to arrest that does not involve exigent circumstances, the courts would be swamped. And even if we arbitrarily singled out BAC tests incident to arrest for this special treatment, as it appears the dissent would do, see post, at 12–14, the impact on the courts would be considerable. The number of arrests every year for driving under the influence is enormous—more than 1.1 million in 2014.[91] Particularly in sparsely populated areas, it would be no small task for courts to field a large new influx of warrant applications that could come on any day of the year and at any hour. In many jurisdictions, judicial officers have the authority to issue warrants only within their own districts, see, e.g., Fed. Rule Crim. Proc. 41(b); N. D. Rule Crim. Proc. 41(a) (2016–2017), and in rural areas, some districts may have only a small number of judicial officers.

The Court found no distinction between "an arrestee's active destruction of evidence and the loss of evidence due to a natural process." The Court emphasized that under Robinson, the authority was

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[88] Skinner v. Railway Lab. Execs. Ass'n, 489 U.S. 602 (1989).
[89] Maryland v. King, 133 S.Ct. 1958 (2013); Cupp v. Murphy, 412 U. S. 291 (1973).
[90] Mackey v. Montrym, 443 U. S. 1 (1979).
[91] FBI, Uniform Crime Report, Crime in the United States, 2014, Arrests 2 (Fall 2015).

categorical and “does not depend on an evaluation of the threat to officer safety or the threat of evidence loss in a particular case.”

For breath testing, the Court concluded “the Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving. The impact of breath tests on privacy is slight, and the need for BAC testing is great.”

The Court moved on to blood testing, which are “significantly more intrusive, and their reasonableness must be judged in light of the availability of the less invasive alternative of a breath test.” The court noted that one advantage is that they capture the presence of other impairing substances. The Court agreed that “nothing prevents the police from seeking a warrant for a blood test when there is sufficient time to do so in the particular circumstances or from relying on the exigent circumstances exception to the warrant requirement when there is not.” And, it agreed, a blood test requires less participation from the subject, but many states discourage forcible blood tests from a resisting subject. In North Dakota, for example. “only in cases involving an accident that results in death or serious injury may blood be taken from arrestees who resist.” (The Court noted that a subject can thwart a breath test, but that many states consider that a refusal.)

The Court summed up:

> Because breath tests are significantly less intrusive than blood tests and in most cases amply serve law enforcement interests, we conclude that a breath test, but not a blood test, may be administered as a search incident to a lawful arrest for drunk driving. As in all cases involving reasonable searches incident to arrest, a warrant is not needed in this situation.

Moving to the final issue, the Court agreed it had previously “referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply.” However, it is “another matter, however, for a State not only to insist upon an intrusive blood test, but also to impose criminal penalties on the refusal to submit to such a test. There must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads.”

Looking at the facts in each of the cases at bar, the Court continued:

> Petitioner Birchfield was criminally prosecuted for refusing a warrantless blood draw, and therefore the search he refused cannot be justified as a search incident to his arrest or on the basis of implied consent. There is no indication in the record or briefing that a breath test would have failed to satisfy the State’s interests in acquiring evidence to enforce its drunk-driving laws against Birchfield. And North Dakota has not presented any case-specific information to suggest that the exigent circumstances exception would have justified a warrantless search. Unable to see any other basis on which to justify a warrantless test of Birchfield’s blood, we conclude that Birchfield was threatened with an unlawful search and that the judgment affirming his conviction must be reversed.
>
> Bernard, on the other hand, was criminally prosecuted for refusing a warrantless breath test. That test was a permissible search incident to Bernard’s arrest for drunk driving, an arrest whose legality Bernard has not contested. Accordingly, the Fourth Amendment did not require officers to obtain a warrant prior to demanding the test, and Bernard had no right to refuse it.
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> Unlike the other petitioners, Beylund was not prosecuted for refusing a test. He submitted to a blood test after police told him that the law required his submission, and his license was then suspended and he was fined in an administrative proceeding. The North Dakota Supreme Court held that Beylund’s consent was voluntary on the erroneous assumption that the State could permissibly compel both blood and breath tests. Because voluntariness of consent to a search must be “determined from the totality of all the circumstances,” we leave it to the state court on remand to reevaluate Beylund’s consent given the partial inaccuracy of the officer’s advisory.9

The North Dakota decisions were reversed and the Minnesota case was affirmed.

DOMESTIC VIOLENCE

Voisine v. U.S., --- U.S. --- (2016), Decided June 27, 2016

FACTS: Voisine pled guilty in 2004 for assaulting his girlfriend in Maine. The specific Maine crime made it a misdemeanor offense to ""intentionally, knowingly or recklessly cause[ ] bodily injury or offensive physical contact to another person." During a subsequent, unrelated criminal investigation, it was discovered he owed a rifle. When a background check revealed the 2004 conviction, he was charged with possession of the weapon. In 2008, Armstrong took a guilty plea in a similar situation, and again, guns were found in a criminal investigation. Both men argued that they were "not subject to [18 U.S.C.] §922(g)(9)'s prohibition because their prior convictions (as the Government conceded) could have been based on reckless, rather than knowing or intentional, conduct." In both cases, the District Court disagreed. Both took a conditional guilty plea and appealed.

The First Circuit U.S. Court of Appeals affirmed the pleas, "holding that "an offense with a mens rea of recklessness may qualify as a 'misdemeanor crime of violence' under §922(g)(9)." Following the decision in U.S. v. Castleman, the case was remanded back for reconsideration, but it was once again affirmed.[92]

Voisine and Armstrong sought certiorari, and the U.S. Supreme Court granted review.

ISSUE: Does a reckless assault conviction under domestic circumstances invoke the federal gun ban?

HOLDING: Yes (but see note)

DISCUSSION: The Court began by noting that the issue before it was "whether §922(g)(9) applies to reckless assaults, as it does to knowing or intentional ones. To commit an assault recklessly is to take that action with a certain state of mind (or mens rea)—in the dominant formulation, to "consciously disregard[ ]" a substantial risk that the conduct will cause harm to another." As such, the Court agreed that a "reckless domestic assault qualifies as a "misdemeanor crime of domestic violence" under §922(g)(9)."

The Court agreed, however, that "the force involved in a qualifying assault must be volitional; an involuntary motion, even a powerful one, is not naturally described as an active employment of force." The term "use" "does not demand that the person applying force have the purpose or practical certainty that it will cause harm, as compared with the understanding that it is substantially likely to do so. Or, otherwise said, that word is indifferent as to whether the actor has the mental state of intention, knowledge, or recklessness with respect to the harmful consequences of his volitional conduct."

The Court agreed that "Congress enacted §922(g)(9) in 1996 to bar those domestic abusers convicted of garden-variety assault or battery misdemeanors—just like those convicted of felonies—from owning guns." At that time, and as of now, "a significant majority of jurisdictions—34 States plus the District of Columbia—defined such misdemeanor offenses to include the reckless infliction of bodily harm." Since the "federal ban on firearms possession applies to any person with a prior misdemeanor conviction for the "use . . . of physical force" against a domestic relation. §921(a)(33)(A). That language, naturally read, encompasses acts of force undertaken recklessly—i.e., with conscious disregard of a substantial risk of harm. And the state-law backdrop to that provision, which included misdemeanor assault statutes covering reckless conduct in a significant majority of jurisdictions, indicates that Congress meant just what it said. Each petitioner's possession of a gun, following a conviction under Maine law for abusing a domestic partner, therefore violates §922(g)(9)."

[92] 134 S.Ct. 1405 (2014).

The Court affirmed the pleas.

NOTE: Although in most states, apparently, reckless conduct is that where an individual consciously disregards a risk of which they are aware, in Kentucky, that is not the case. In Kentucky, the conduct and mental state described in the cases at bar would more properly be classified as "wanton" – as defined in KRS 501.020(3). As such, it is questionable whether under Voisine, that a subject convicted of a Reckless Assault under KRS 508.030(1)(b) would be subject to the ban under 18 U.S.C. §922(g)(9).